11-1-2012

First Place: The State of Florida v. Joelis Jardines

Barry Bryan

Justin Bigelow

APPELLATE ADVOCACY
FALL 2012

The State of FLORIDA, Petitioner,

v.

Joelis Jardines, Respondent.

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No. 11-564

IN THE

SUPREME COURT OF THE UNITED STATES

FALL TERM 2012

THE STATE OF FLORIDA,
Petitioner,

v.

JOELIS JARDINES,
Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF FOR PETITIONER

November 1, 2012
Round #5, 7:45pm

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QUESTIONS PRESENTED

I. May a trained narcotics detection dog sniff the air at the front door of a suspected marijuana grow house without violating the resident's Fourth Amendment right against unreasonable searches?

II. Under the Fourth Amendment, is a sniff of air by a trained narcotics detection dog where two law enforcement officers are legally present reasonable with less than probable cause?

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OPINION BELOW

The opinion of the Supreme Court of the State of Florida is reported at *Jardines v. State of Fla.* (*Jardines II*), 73 So.3d 34 (Fla. 2011).

JURISDICTION

This Court has jurisdiction to review the decision of a State Supreme Court interpreting the protections of the United States Constitution. 28 U.S.C. § 1257(a) (West 2012). This Court granted a writ of certiorari on January 6, 2012.

STANDARD OF REVIEW

This Court has held that "the ultimate questions of reasonable suspicion and probable cause to make a warrantless search should be reviewed *de novo*." *Ornelas v. United States*, 517 U.S. 690, 691 (1996).

STATEMENT OF THE CASE

Statement of the Facts

Detective William Pedraja has been a police officer with the Miami-Dade County Police Department ("MCPD") for 17 years. (J.A. 5.) He has trained extensively in narcotics identification, performed numerous narcotics arrests and searches, has a familiarity with many drug creation techniques, and has investigated many hydroponic marijuana labs. (J.A. 5.) On November 3, 2006, the MCPD received an anonymous tip that Respondent's home contained a marijuana grow operation. (J.A. 3, 6.) Detective Pedraja began surveillance of the house on December 6, 2006. (J.A. 8.) Detective Pedraja's familiarity with the common methods used by urban marijuana growers led him to believe that the home was being used for the purpose of growing contraband. (J.A. 6-8.)

At the home, the detective was joined by members of the MCPD's Narcotics Bureau and Drug Enforcement Agency ("DEA") agents, and began to observe the scene. (J.A. 109.) The driveway was empty and the window blinds were shut. (J.A. 16.) Despite 66-degree weather,[1] the air-conditioning unit that served the residence had run for about fifteen minutes without recycling. (J.A. 32, 38.) Hydroponic marijuana labs require an air-conditioning unit to offset the heat created by the high intensity bulbs used to mimic daylight, which allows the marijuana to grow faster. (J.A. 38.) An air-conditioning unit recycles to maintain the temperature within a

[1] *Quality Controlled Local Climatological Data: Hourly Observations Table Opa Locka Airport Miami, FL for Dec. 2006*, NOAA, http://cdo.ncdc.noaa.gov/qclcd/QCLCD (last visited Oct. 2, 2012).

home, but according to Detective Pedraja, when a unit recycles, it "may result in the odor . . . being discharged outside of the home via cooling vents, windows and/or doors." (J.A. 7.) Such air-conditioner use causes higher than average home electricity use; however, in the detective's experience, hydroponic labs often illegally divert power so that this higher use of electricity does not show up on power bills. (J.A. 42.)

Detective Pedraja was joined by Detective Bartelt and his K-9 drug detection dog, Franky. (J.A. 9.) Detective Bartelt has been an officer with the MCPD for seven years, a member of the Narcotics Bureau for six years, and a canine handler since 2004. (J.A. 9-10.) He has trained extensively in canine narcotics detection and has conducted over six hundred investigations. (J.A. 10-11.) He also has received weekly maintenance training with Franky. (J.A. 13.) Franky is trained to detect the smell of narcotics, including marijuana, and to lead his handler to the source of the narcotics through recognizable behavior changes. (J.A. 9-10.) He has participated in more than 650 narcotics detection tasks, resulting in nearly 400 positive drug alerts. (J.A. 13.)

Detective Pedraja observed the home for about 15 to 20 minutes, then went up the driveway to the front door with Detective Bartelt and Franky. (J.A. 37, 49.) On the driveway, Franky began tracking contraband. (J.A. 53.) At the entrance of the porch, Franky led Detective Bartelt toward the front door. (J.A. 53.) Franky started "bracketing," which is a technique used by narcotics dogs when they reach the "cloud" of narcotic smell to determine the strongest point of the smell. (J.A. 50-52.) As he sniffed at the base of the front door Franky immediately sat down, which indicated that he had found the source of the narcotic smell. (J.A. 53.) Detective Bartelt smelled mothballs at the base of the porch. (J.A. 55.) The detective then took Franky

back to his car, told Detective Pedraja that the front door was the source of the smell, and left to attend to cases elsewhere. (J.A. 53-54.)

While at the front door, Detective Pedraja smelled marijuana. (J.A. 112) The detective attempted a "knock and talk," in which he knocked on the door to request consent to search the house but received no response. (J.A. 109.) Detective Pedraja then returned to his car and began preparing the search warrant, which was granted by a Florida court. (J.A. 38.)

The detective executed the search warrant with DEA agents, and upon entry discovered a marijuana production lab. (J.A. 17.) During the search, Respondent attempted to escape through the back of the house. (J.A. 17.) After he was caught, Respondent confessed both orally and in a written statement to Detective Pedraja. (J.A. 17.)

Preliminary Statement

The State of Florida charged Respondent with one count of felony trafficking in marijuana and one count of grand theft in the third degree. (J.A. 2.)

Prior to trial, Respondent filed a motion to suppress the oral and written confession as well as the drugs seized during the search, alleging the search was unconstitutional. (J.A. 16-20.) Specifically, Respondent argued that the search warrant was improperly based on an alert to the presence of illegal drugs on the property by a trained narcotics detection dog. (J.A. 16.)

The trial court in Miami-Dade County held an evidentiary hearing on the motion to suppress. (J.A. 21.) The court concluded that Franky alerted to the presence of illegal contraband before Detective Pedraja smelled marijuana at the house. (J.A. 135, n.1.) The court also granted the motion to suppress, finding that its authority was constrained by a similar case in a different judicial district, *Florida v. Rabb*, 920 So.2d 1175 (Fla. Dist. Ct. App. 2006). (J.A. 134.) The *Rabb* Court had held that a sniff by a police dog constituted an unreasonable search

under the Fourth Amendment. *Rabb*, 920 So.2d at 1187. The court of appeal later noted that "under Florida Supreme Court precedent, the trial court had no realistic alternative other than to follow the Fourth District's decision in *Rabb*." *State of Florida v. Jardines* (*Jardines I*), 9 So.3d 1, 15 (Fla. Dist. Ct. App. 2008) (Cope, J., concurring in part and dissenting in part).

The State of Florida appealed and the District Court of Florida, Third District, reversed the order to suppress the illegal drugs, and the oral and written confession. *Id.* at 2. The Third District Court held that the dog sniff was not a search under the Fourth Amendment and that the police dog and officers were legally present at the house. *Id.* at 6, 8. The panel also concluded that under the inevitable discovery doctrine, regardless of whether the police narcotics dog alerted to the presence of contraband before Detective Pedraja smelled marijuana, the drugs would have been found in the course of Detective Pedraja's investigation. *Id.* at 9. The Third District Court certified a direct conflict between its opinion that a dog sniff is not a search and the contrary opinion in *Rabb*. *Jardines I*, 9 So.3d at 15.

Respondent appealed the reversal of the order to suppress the illegal drugs and confession to the Florida Supreme Court, which quashed the Third District Court's decision and approved the result in *Rabb*. *Jardines II,* 73 So.3d at 56. In a split decision, the Supreme Court of Florida held that the sniff of marijuana at Respondent's house by the police narcotics dog was a search within the meaning of the Fourth Amendment, despite acknowledging that a dog sniff is considered "*sui generis*" by the Supreme Court of the United States. *Id.* at 49.

The State of Florida filed a petition for writ of certiorari, which this court granted on January 6, 2012. (J.A. 1.)

SUMMARY OF ARGUMENT

This Court should reverse the Florida Supreme Court's decision to suppress evidence against Respondent, Joelis Jardines. The Fourth Amendment and the Florida State Constitution protect people against unreasonable searches, but here the dog sniff was reasonable. Because this case does not involve trespass, this Court should use the established two-fold test to determine whether a person has a privacy interest in a contested area, requiring Respondent to demonstrate both a subjective and an objective expectation of privacy. Here, Respondent did not have a privacy expectation in the smells caused by his hydroponic marijuana grow operation.

Respondent failed to demonstrate a subjective expectation of privacy in his front porch because it was open to the public. Likewise, society does not condone such an expectation of privacy because Respondent's front porch was not within the curtilage of his home. Even if society does condone such an interest, the police had a lawful right to go to his front door, and the drug sniff does not violate Respondent's rights either through use of technology or as a physical intrusion on his privacy interests. Additionally, this Court has held that people do not have a privacy interest in contraband. Finally, this Court has never held that a drug sniff by a trained police dog is a Fourth Amendment search.

Alternatively, this Court should conclude that use of a dog sniff is subject only to a reasonable suspicion standard, as this Court has held with regard to stop and frisks. Reasonable suspicion is the proper standard because the government interest in law enforcement and crime prevention outweighs the minimal intrusion upon Respondent's privacy interest caused by a dog sniff. Detective Pedraja possessed reasonable suspicion that Respondent's house contained a hydroponic marijuana grow operation based upon the totality of the circumstances, making the dog sniff reasonable under the Fourth Amendment.

Similarly, this Court should hold that Franky's sniff outside Respondent's house was *per se* reasonable because a dog sniff is *sui generis* – a category unto itself. This Court has indicated that a dog sniff is merely one component of a single investigation. The Court determines whether the overarching investigation is constitutional based on its context. Accordingly, Franky's sniff and positive alert to contraband was constitutional because Detectives Pedraja and Bartelt were legally present outside Respondent's house. Accordingly, this Court should overturn the Florida Supreme Court's opinion suppressing evidence of Respondent's marijuana cultivation.

ARGUMENT

I. EVIDENCE OF MARIJUANA CULTIVATION SHOULD NOT BE SUPPRESSED BECAUSE A SNIFF OF AIR BY A TRAINED NARCOTICS DETECTION DOG OUTSIDE A HOUSE IS NOT A SEARCH FOR WHICH THE FOURTH AMENDMENT REQUIRES A WARRANT.

To protect people against unreasonable government intrusions, the Fourth Amendment states, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . ."[2] U.S. Const. amend. IV. Justice Harlan, in a concurrence, announced a two-part test, which this Court later adopted, that identified the limits of Fourth Amendment protections against unreasonable searches. *See California v. Ciraolo*, 476 U.S. 207, 211 (1986) (citing *United States v. Katz*, 389 U.S. 347, 360 (1967) (Harlan, J., Concurring)); *see also Minnesota v. Carter*, 525 U.S. 83, 89 (1998). The test is based on this Court's recognition that "the Fourth Amendment protects people, not places." *Katz*, 389 U.S. at 351. The two-part test questions (1) whether an individual has manifested "an actual (subjective) expectation of

[2] The protections of the United States Constitution govern this case because the Florida Constitution provides identical protections against government searches and seizures. Fla. Const. art. I, § 12. Specifically, the Florida Constitution states that the right against government intrusions "shall be construed in conformity with the Fourth Amendment to the United States Constitution, as interpreted by the United States Supreme Court." *Id.*

privacy" and (2) whether that subjective expectation of privacy is honored by society at large as reasonable. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

Although this Court recognizes other Fourth Amendment tests, Justice Harlan's two-part expectation of privacy test governs this case. This Court has also identified violations of the Fourth Amendment using a "common-law trespassory test." *United States v. Jones*, 132 S. Ct. 945, 952 (2012). The test emphasizes common-law trespass in questioning whether law enforcement physically intruded upon private property unlawfully. *Id.* at 949. However, this Court acknowledged in *Jones* that situations not involving trespass are analyzed under the *Katz* two-part expectation of privacy test. *Id.* at 953. Because this case does not involve trespass, the *Katz* standard is the appropriate test.

Here, evidence of Respondent's marijuana cultivation should not be suppressed because it was obtained pursuant to a legal dog sniff outside Respondent's house. While this Court enforces the Fourth Amendment by suppressing evidence that was obtained in violation of the restraints identified by the two-part expectation of privacy test, Respondent could have no reasonable expectation of privacy in marijuana cultivation, and society does not honor any expectation of privacy in illegal drugs. Accordingly, this Court should reverse the Florida Supreme Court and hold that a sniff of air by a trained narcotics detection dog outside a house is not a search regulated by the Fourth Amendment.

A. Respondent Had Neither a Subjective nor an Objective Expectation of Privacy in His Front Porch.

Respondent has no privacy interest in his front porch according to Justice Harlan's two-part test as defined in his *Katz* concurrence. The test requires Respondent to have both a subjective and an objective privacy interest in the front porch of his home. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

1. Respondent does not have a subjective expectation of privacy in his front porch because he did not manifest a privacy interest in that area.

The subjective factor requires that the Respondent "manifested a subjective expectation of privacy in the object of the challenged search . . . ." *Ciraolo,* 476 U.S. at 211 (citing *Smith v. Maryland,* 442 U.S. 735, 740 (1979)). The Court found that the defendant in *Ciraolo* had, by erecting a 10-foot fence around his home, manifested a privacy interest "from at least street-level views." 476 U.S. at 211.

Here, Respondent took no steps to show neighbors, strangers or police that he intended to keep his front porch private. He had not erected a fence, nor had he put up a "Keep Out" sign. His front porch – so far as privacy interests are concerned – was unremarkable compared to those in a typical neighborhood. It is true that Respondent had, by closing his blinds, manifested an interest in the *interior* of the home, but the dog sniff did not occur within his home. The sniff was conducted on Respondent's porch, and thus went no further than he had invited the public. (J.A. 16.)

Respondent's failure to manifest a privacy interest alone shows that he did not have a subjective expectation of privacy, but he also took actions to indicate that he expected the public would come to his front door. Respondent placed mothballs at the base of his front porch, which, with their own distinctive odor, could mask the smell of marijuana. (J.A. 55.) This action indicates that he knew people approaching his front door would smell the drugs, and possibly report the smell to the police. Respondent failed to take actions to exclude people from his porch, and knew that the public would be able to approach his front door. Indeed, he expected them to do so, and thus did not have a subjective expectation of privacy there.

2. Respondent does not have an objective expectation of privacy in his front porch because it was outside the curtilage of his home and Florida does not recognize a privacy interest in front porches.

Similarly, an expectation of privacy in the front porch of a person's home is not one that society is willing to consider "reasonable." *See Katz,* 389 U.S. at 361 (Harlan, J., concurring). This is especially true when the expectation of privacy is not clearly expressed. Neighbors and community members who might request a cup of sugar or discuss a local ballot are accustomed to honoring "Keep Out" and "No Solicitations" signs. Here, Respondent's neighbors, much less police officers conducting a knock and talk, had no indication that Respondent considered his front porch off limits. Thus, police should not be expected to honor an unexpressed privacy interest in Respondent's front porch.

Additionally, Respondent's front porch stands outside his home's curtilage, and therefore he had no reasonable expectation of privacy there. The Court has often used a curtilage analysis to determine whether a person carries a privacy interest in a disputed area of their property. *See Oliver v. United States,* 466 U.S. 170, 179-80 (1984). The curtilage is "considered part of the home for Fourth Amendment purposes." *Id.* at 180. This Court believes:

> that curtilage questions should be resolved with . . . four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.

United States v. Dunn, 480 U.S. 294, 301 (1987).

While the porch is adjacent to the interior of the home proper, arguably satisfying the first factor, it is not necessarily part of the curtilage, as the remaining factors outweigh the proximity consideration. The second factor is not satisfied because the record does not indicate that any enclosure surrounded the home. There was an archway at the entrance to the porch, but the court

in *Dunn* was considering enclosures such as fences. 480 U.S. at 302; (J.A. 50.) The third factor asks whether "intimate activities of the home" occur in the area being analyzed. *Dunn,* 480 U.S. at 302. The porch and front door are visible to the public from the street, so it is unlikely that any intimate, private activity would occur there. Finally, the front porch was not protected from observation; the record does not indicate any obstruction that would prevent Detective Pedraja and others from performing surveillance on the house. (J.A. 32.) The front porch was exposed to public view and unprotected, which outweighs the proximity factor. Accordingly, Respondent's front porch was not part of the curtilage of the house.

A privacy interest in a smell coming from inside the home is also unreasonable under the plain view doctrine. As Justice Harlan said in *Katz,* "objects, activities, or statements that [one] exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to [oneself] has been exhibited." 389 U.S. at 361 (Harlan, J., concurring). This doctrine encompasses smells. "The 'plain smell' doctrine, in turn, is simply a logical extension of the 'plain view' doctrine . . . ." *United States v. Angelos,* 433 F.3d 738, 747 (10th Cir. 2006) (citation omitted). Standing on Respondent's porch, Detective Pedraja could smell live marijuana plants. (J.A. 16). As discussed below, the use of a drug sniffing dog does not change this analysis. Respondent allowed the smell of marijuana to emanate from his home and into an area where he anticipated public contact. In doing so, he exposed the smell to the public. Accordingly, Respondent had no privacy interest in the smell of the contraband that was present on his front porch.

Further, Florida law does not offer a heightened privacy protection in a person's front porch. Relevant case law unambiguously states that individuals do not have a privacy interest in their front porches. The Florida Supreme Court has held that, while a police officer illegally

entered a person's backyard when a neighbor complained of a marijuana grow operation, "[u]nder Florida law it is clear that one does not harbor an expectation of privacy on a front porch where salesmen or visitors may appear at any time." *Florida v. Morsman,* 394 So.2d 408, 409 (Fla. 1981) (citing *Florida v. Detlefson*, 335 So.2d 371 (Fla. Dist. Ct. App. 1976); *Florida v. Belcher*, 317 So.2d 842 (Fla. Dist. Ct. App. 1975)).

Floridians clearly have no expectation of privacy in their front porches. Police are not prohibited from being there, and anything that takes place on an unprotected porch is exposed to the public. Not only did Respondent fail to indicate a desire for privacy in his front porch, society at large, and Florida specifically, is not "prepared to recognize [that interest] as 'reasonable.'" *Katz,* 389 U.S. at 361 (Harlan, J., concurring).

B. Drug Sniffing Dogs Are Not Technology that Encroaches on Fourth Amendment Rights.

While drug sniffing dogs are employed to detect odors that might otherwise be beyond the senses of police officers, they are a permissible use of technology, far removed from the concerns that Justice Harlan expressed in *Katz.* There, he wrote that "reasonable expectations of privacy may be defeated by electronic as well as physical invasion." *Katz,* 389 U.S. at 362 (Harlan, J., concurring). Thus, police may not use technology as an end run around the Fourth Amendment. Privacy may still be invaded despite what may appear to be a passive police role. However, the dog sniff in the present case did not invade Respondent's protected physical space. The sniff could reveal only the presence or absence of contraband to the officers. Furthermore, the sniff is analogous to other devices used by law enforcement that this Court has held do not cause investigations to be considered searches. Therefore, the sniff did not violate Respondent's privacy right.

1. Airplanes have been used to discover contraband on private property without violating Fourth Amendment rights and dogs serve police in the same capacity.

This Court has held that police uses of aircraft to observe contraband growing in residents' unprotected backyards are not searches. For the purposes of Fourth Amendment analysis, the use of drug sniffing dogs is analogous to the use of aircraft, because they each serve similar functions as tools of law enforcement.

In *Ciraolo,* police were unable to see into the defendant's backyard because there was a fence around the residence. 476 U.S. at 209. The court recognized that, at least from street level, the defendant had a subjective expectation of privacy, and, further, that the backyard was likely a part of the curtilage of the home. *Id.* at 211-13. However, because the garden was not protected from aerial views, the defendant there did not have a reasonable expectation of privacy, so the police could take an aircraft into public airspace at 1,000 feet and observe the marijuana plants. *Id.* at 213. The Court noted that "[a]ny member of the public flying in this airspace who glanced down could have seen everything that these officers observed." *Id.* at 213-14. Since this is "an age where private and commercial flight in the public airways is routine, it is unreasonable for [r]espondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet." *Id.* at 215. The public was able to legally act in the same manner as the police and, in the eyes of the Court, did so routinely, thus there was no infringement on the defendant's privacy. *See also Florida v. Riley*, 488 U.S. 445, 451 (1989) (relying on *Ciraolo*, police use of a helicopter at 400 feet above ground is not a search because the defendant did not have a reasonable expectation of privacy in his partially open greenhouse viewed from navigable airspace).

Respondent did not expose his marijuana grow lab itself to the public, but he did expose the smell of the plants to the outside world. Any member of the public could have stepped onto his front porch and smell it. While it is true that a dog's ability to detect odors is more enhanced than a human's, this is no different from using a plane to allow observation from the air. Human beings, by their faculties alone, could not enter the airspace that would allow them to view a yard from above. A person would have to purchase a plane or a plane ticket to make these observations. This Court considered both private and commercial flight routine. *Ciraolo*, 476 U.S. at 214. Ownership of dogs is equally routine. Indeed, it is more likely that a person would come to the front porch of a home with a dog than that they would purchase a plane to make observations of a neighbor's back yard. Further, drug sniffing dogs are freely available for purchase by the public.[3]

That the dog has been trained to detect and alert police to the presence of contraband makes no difference. In *Ciraolo,* this Court deemed the officer's training to recognize marijuana "irrelevant" because "[a]ny member of the public flying in this airspace who glanced down could have seen everything that these officers observed." 476 U.S. at 213-14. Dogs have a better sense of smell than humans, therefore any dog near a home with a marijuana grow lab may smell the contraband. The fact that a dog is trained to recognize and communicate this information to a handler is similarly irrelevant. Dogs and airplanes are potential tools of law enforcement, and enhance the ability of police to enforce the law in similar ways. The use of airplanes in public airspace is not a Fourth Amendment search, and this Court should similarly hold that dog sniffs are not searches.

[3] *Drug Detection Dogs*, Southern Coast K9, Inc., (2010) http://www.southerncoastk9.com/Drug-Dogs (last visited September 25, 2012).

2. Dog sniffs are not physically invasive and do not indiscriminately reveal the contents of a house.

Dog sniffs, unlike intrusive technology and other technologies that search indiscriminately, do not invade Fourth Amendment privacy rights. The special nature of a dog sniff distinguishes it from intrusive and indiscriminate technology. First, in *Silverman v. United States*, this Court found that the use of a "spike" microphone to eavesdrop on conversations in a home was a violation of the defendant's rights because it was "accomplished by means of . . . a physical intrusion . . . ." 365 U.S. 505, 506-09 (1961). A dog sniff presents no such intrusion. Though the dog smelled plants located inside the home, the cloud of odor that the dog smelled was outside the home. (J.A. 50-52.) Franky tracked the smell to its strongest point – the front door – and showed Detective Bartelt he had found the source of the smell by sitting, at which time the dog sniff ended. (J.A. 63.) The drug sniff presented no physical invasion of the protected area of Respondent's house.

More recently, in *Kyllo v. United States,* this Court invalidated the use of thermal imaging devices on a residence. 533 U.S. 27, 29 (2001). This Court held that where "the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." *Id.* at 40. The *Kyllo* Court rejected the Government's contention that knowledge of the heat emanating from the home would not show private activity because the device might show, "for example, at what hour each night the lady of the house takes her daily sauna and bath . . . ." *Id.* at 37-38. The fact that something much more mundane might be revealed was of no matter to this Court because any details "were intimate details because they were details of the home . . . ." *Id* at 38.

While a dog sniff does reveal details about the home, these are not "intimate" details because a dog sniff, as a police procedure, can only detect contraband, in which Respondent does not have a privacy interest. *See United States v. Jacobsen,* 466 U.S. 109, 123 (1984). These two tools of law enforcement function in similar ways, but there are key distinctions that place dogs and thermal imaging devices on either side of the Fourth Amendment analysis. A thermal imaging device indiscriminately detects heat signatures. Similarly, when a dog uses its sense of smell, it cannot choose to smell one thing and not another. However, while a dog can detect all smells greater than a human being can, it is only trained to alert a police officer to the presence of illegal contraband, as Franky did here. (J.A. 13.) A thermal imaging device, on the other hand, has no mechanism that allows the device to filter activity or objects from review based upon a legitimate privacy interest. A drug sniffing dog will only indicate to a police officer the presence of narcotics. The information gathered by the police about a small spectrum of smells, contraband alone, should not run afoul of this Court's holding in *Kyllo* because a person has no privacy interest in that contraband. *See Jacobsen,* 466 U.S. at 123. The dog sniff used by Detectives Pedraja and Bartelt invaded no privacy interest, either through physical invasion or detection of private matters, and thus is not a search for the purposes of the Fourth Amendment.

C. This Court, and Other Federal and State Courts, Have Overwhelmingly Held that a Dog Sniff Is Not a Fourth Amendment Search.

1. There is no legitimate expectation of privacy in contraband and a dog sniff detects nothing but contraband and is minimally invasive.

This Court's decisions in *United States v. Place,* 462 U.S. 696 (1983) and *Jacobsen*, 466 U.S. 109, have been applied to a variety of cases involving dog sniffs. A majority of courts have held, in a variety of factual circumstances, that dog sniffs are not searches. Only the Second

Circuit has held that a dog sniff is a search. That court, as well as the Florida Supreme Court, misapplied the law.

In *Place,* this Court was asked to decide whether law enforcement officers had permissibly detained luggage at an airport for exposure to a dog sniff, and concluded that a dog sniff was not a Fourth Amendment search. 462 U.S. at 707. The officers suspected the respondent in that case, Place, was carrying contraband in his luggage because of his behavior and discrepancies in the address tags on his luggage. *Id.* at 698. Place refused to consent to a search of his luggage; the officers took the luggage and had a narcotics dog sniff the bags. *Id.* at 699. The dog's behavior indicated to the officers that there was contraband in the bags, and on this test, the officers obtained a search warrant. *Id.* After determining that the seizure of the bags was permissible, this Court held that though "a person possesses a privacy interest in the contents of personal luggage," the sniff "did not constitute a 'search' within the meaning of the Fourth Amendment." *Id.* at 706-07.

This Court stated that "the canine sniff is *sui generis*" – a category unto itself – for two reasons. *Id.* at 707. First, the nature of the sniff test meant that the bag could remain closed, and, compared to a hand search by an officer the investigation was "much less intrusive than a typical search." *Id.* Second, "the sniff discloses only the presence or absence of narcotics, a contraband item. This limited disclosure . . . ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods." *Id.* Because the Court was "aware of no other investigative procedure that is so limited," the sniff did not rise to the level of a search under the Fourth Amendment. *Id.*

The investigation here was no different. The sniff performed by Franky, handled by Detective Bartelt, was non-invasive, and disclosed only the presence of contraband. *Id.* Franky

could not alert Detective Bartelt to the contents of Respondent's house except narcotics, just as the dog in *Place* could neither reveal nor communicate whether the luggage contained clothes or anything other than contraband. 462. U.S. at 707. The investigation took place entirely outside the home. While there is a privacy interest in the home, just as there is in luggage, the officers and dogs in *Place* and this case never saw or smelt anything but the exterior of the articles they investigated.

In *Jacobsen,* this Court followed the holding in *Place* to find that an investigation that can only "reveal whether a substance is cocaine . . . compromises no legitimate privacy interest," and thus does not violate the Fourth Amendment protection against unreasonable searches. *Jacobsen,* 466 U.S. at 123. There, federal agents conducted a field test on a suspicious package. *Id.* at 112. Critical to the *Jacobsen* Court's analysis, like the analysis in *Place,* was that the field test could determine only whether the white powder they were investigating was cocaine, and no more, "not even whether the substance was sugar or talcum powder." *Jacobsen,* 466 U.S. at 122. Because the defendant did not have "an interest in privacy that society is prepared to recognize as reasonable" in cocaine and the test revealed nothing but the presence or absence of that narcotic, no search took place. *Id.* at 122-24. *See also Illinois v. Caballes,* 125 U.S. 405, 409 (2005) (following *Place* and *Jacobsen*, finding no Fourth Amendment search in a law enforcement officer's use of a drug sniffing dog during a legitimate traffic stop).

Respondent had no legitimate privacy interest in the contraband he grew in his home. Franky's sniff could reveal nothing but narcotics. Franky's only communication to Detective Bartelt during an investigation comes in the form of an alert, and, per his training, he only alerts when he smells contraband. (J.A. 13.) The detectives performed no search because their

investigation was limited to visual observations, an attempted knock and talk, and the smell of contraband.

Basing their decisions on *Place* and *Jacobsen,* a majority of circuit courts have also found that dog sniffs are not searches. For example, in *United States v. Brock,* the Seventh Circuit found that a drug sniff "from the common area of defendant's residence," outside of a locked bedroom was not a search. 417 F.3d 692, 697 (7th Cir. 2005). That court held that the warrant issued based on that sniff did not violate the defendant's Fourth Amendment rights because the defendant had no legitimate privacy interest in his contraband, the investigation revealed only the presence or absence of that contraband, and the police officers were in the home with the consent of the defendant's roommates. *Id.*

Numerous other circuit courts have also relied on this Court's decisions to find that dog sniffs are not searches. *See United States v. Reed,* 141 F.3d 644, 650 (6th Cir. 1998) (dog sniff not a search while legally inside a home, looking for a burglar); *United States v. Roby,* 122 F.3d 1120, 1125 (8th Cir. 1997) (dog sniff outside hotel room not a search); *United States v. Vasquez,* 909 F.2d 235, 238 (7th Cir. 1990) (dog sniff of garage while in public alley not a search); *United States v. Colyer,* 878 F.2d 469, 477 (D.C. Cir. 1989) (dog sniff of train sleeper car while in public corridor not a search). These decisions show that *Place* and *Jacobsen* apply to a variety of circumstances. The public nature of the investigation in each of those cases was not determinative, so long as the person did not have a reasonable privacy expectation in the place investigated, the police activity itself was minimally invasive, and could reveal nothing but contraband – for which there is no legitimate privacy interest.

As in *Place* and *Jacobsen*, Respondent has no legitimate privacy interest in the marijuana grown at his residence. The limited nature of the investigation, which did not intrude into

Respondent's house, could reveal nothing but the presence of a substance Franky was trained to find – contraband. (J.A. 13.) Because dog sniffs targeting narcotics are minimally invasive, and only detect the presence or absence of contraband, for which Respondent did not have a legitimate expectation of privacy, the dog sniff of Respondent's front porch is not a Fourth Amendment search.

In *Michigan v. Jones,* 279 Mich. App. 86 (Mich. Ct. App. 2008), the court held that a dog sniff, applied in nearly identical factual circumstances to the present case, was not a Fourth Amendment search. This Court should apply the Michigan court's reasoning to this case as that court correctly applies this Court's decisions to similar factual circumstances. In *Michigan v. Jones,* an informant told law enforcement officers that the defendant was growing marijuana in his residence for possession and sale. *Id.* at 88. Based on this information and the defendant's prior marijuana possession and manufacturing convictions, the officers performed a dog sniff outside the home that indicated the presence of narcotics. *Id.* On the basis of this evidence, the police obtained a search warrant. *Id.* at 88-89.

Following the decisions in *Place*, *Jacobsen*, and *Caballes*, the Michigan court held that the dog sniff was not a search and upheld the search warrant. *Id.* at 99. After first noting that the officers were legally on the property, the court found the actions of the officers consistent with *Place. Id.* at 95-96. As in *Place,* the court found that the defendant:

> possessed a general privacy expectation with respect to his home . . . but the canine sniff from outside the home and from a lawful vantage point could only disclose the presence of narcotics and not lawful activity and thus did not constitute a search of the home under the Fourth Amendment because no legitimate privacy interest was implicated.

Id. at 96. Neither *Place* nor *Caballes,* the court said, "contain . . . language suggesting that the analysis would differ . . . outside the home from a lawful vantage point." *Id.* at 95. The key in

Place was that the sniff could discover nothing but the presence or absence of contraband – not that the luggage was in a public place. *Michigan v. Jones*, 279 Mich. App. at 96.

While the officers in *Michigan v. Jones* were alerted to the defendant's illegal activities by an informant, the officers in the present case were tipped by an anonymous source; however, the remaining circumstances gave Detective Pedraja enough reason to make use of a dog sniff. (J.A. 8.) The blinds were closed, and there were no cars in the driveway. (J.A. 7.) These factors taken together would lead a highly experienced officer trained in narcotics to have a strong suspicion that the home contained narcotics. (J.A. 5-7.) The officers in *Michigan v. Jones* had only one piece of evidence to suspect the presence of contraband in a home. 279 Mich. App. at 88. Here, Detective Pedraja supplemented the tip by combining his experience and training to analyze multiple indications of illegal activity in Respondent's home. (J.A. 5, 7.) The levels of suspicion in this case and *Michigan v. Jones* were nearly identical, making the Michigan Court of Appeals' reasoning applicable to this case. Franky the narcotics dog would either alert to the presence of contraband, or not, invading on no legitimate privacy expectation of Respondent.

Even if this Court does not consider the levels of suspicion equal, the reasoning of the Michigan court still shows that the dog sniff performed on Respondent's front porch is not a search. The officers were legally present on Respondent's front porch, performing a dog sniff that did not invade his property rights, and would either alert the police to contraband, or give no alert. Respondent has no privacy interest in the contraband, and thus, since the police sought no other information about the home, they did not violate Respondent's rights under the Fourth Amendment.

2. The dog sniff was not an embarrassment for Respondent and could not reveal intimate details of the home.

The Florida Supreme Court incorrectly distinguished this case from this Court's jurisprudence by mischaracterizing the record. The Court reasoned that a dog sniff "constitutes an intrusive procedure that may expose the resident to public opprobrium, humiliation and embarrassment," and therefore "does not *only* reveal the presence of contraband . . . ." *Jardines II*, 73 So.3d at 49.

This case, the court reasoned, was unlike *Place* and others because in those cases "there was no evidence of overbearing or harassing government conduct." *Id.* at 45. Here, instead, the sniff test was not "a casual affair" but a "vigorous and intensive procedure" that "was the end result of a sustained and coordinated effort by various law enforcement departments." *Id* at 46-48. The record does not support this assertion. While it is true that the MCPD and DEA were present, only Detectives Bartelt and Pedraja approached the door. (J.A. 16.) The remaining agents and officers merely conducted surveillance; their detection – which the court reasoned would cause public embarrassment – was highly unlikely and antithetical to the practice of surveillance. (J.A. 16.)

The court also made note of both state and circuit court cases finding that dog sniffs outside of residences were Fourth Amendment searches including *United States v. Thomas,* 757 F.2d 1359 (2d Cir. 1985) and *Rabb,* 920 So.2d 1175. However, both cases misapplied this Court's Fourth Amendment jurisprudence.

The Second Circuit misapplied *Place.* In *Thomas,* the court "recognized the heightened privacy interest that an individual has in his dwelling place" and found that, because it considered a dog sniff to be "a significant enhancement accomplished by a . . . superior . . . sensory instrument," the police had impermissibly infringed on the defendant's Fourth

Amendment rights. *Thomas*, 757 F.2d at 1366-67. However, as *Michigan v. Jones* noted, the holding in *Place* was based on the *sui generis* nature of the sniff – it invades no legitimate privacy interest and is not intrusive – not on the location of the search. 279 Mich. App. at 96.

The *Rabb* court mistakenly held that this Court's decision in *Kyllo* was dispositive. *Rabb*, 920 So.2d at 1184. However, *Kyllo,* as discussed above, held that the use of a thermal imaging device was a Fourth Amendment search because it could reveal "intimate details" of the home, including details that are protected by the Fourth Amendment. 533 U.S. at 37. The search could reveal details beyond those that the Court in *Jacobsen* considered outside the scope of the Fourth Amendment's protections. 466 U.S. at 123.

Dog sniffs are minimally intrusive, and detect only contraband – substances for which there is no expectation of privacy. The dog sniff, while conducted at Respondent's home, a place that contains a strong privacy interest, revealed nothing about his house but the presence or absence of narcotics. The procedure was not invasive, and did not carry a risk of public embarrassment for Respondent. Therefore, the dog sniff at Respondent's front door was not a search for the purposes of the Fourth Amendment.

II. ALTERNATIVELY, EVIDENCE OF DRUGS SHOULD NOT BE SUPPRESSED BECAUSE A SNIFF OF AIR BY A TRAINED NARCOTICS DETECTION DOG OUTSIDE A HOUSE IS A REASONABLE SEARCH UNDER THE FOURTH AMENDMENT.

Even if a sniff of air by a trained narcotics detection dog outside a house is considered a search regulated by the Fourth Amendment, two alternative theories demonstrate that the sniff here was constitutional. First, this Court should conclude that a sniff of air by a trained narcotics detection dog outside a house requires only that law enforcement have reasonable suspicion of criminal activity within the house. Alternatively, this Court should affirm that a

dog sniff, by its nature, is a separate category of search and is therefore reasonable *per se* under this Court's Fourth Amendment jurisprudence.

A. A Sniff of Air by a Trained Narcotics Detection Dog Outside a House Is Constitutional when Based on Reasonable Suspicion.

Reasonable suspicion is the appropriate standard to determine the constitutionality of Franky's sniff outside Respondent's house. This Court has recognized that various discrete search methods need not be based on probable cause by weighing government interests and methods versus an individual's privacy interest. Because the government's interest in law enforcement outweighs the minimal invasion into Respondent's privacy interest, reasonable suspicion is the appropriate standard to use in this case. Here, Detective Pedraja had reasonable suspicion to initiate the dog sniff based on the totality of the circumstances; as a result the search was reasonable.

This Court has identified contexts in which law enforcement may perform a search without probable cause. In *Katz*, Justice Harlan acknowledged that "under the Fourth Amendment, warrants are the general rule, to which the legitimate needs of law enforcement may demand specific exceptions. It will be time enough to consider any such exceptions when an appropriate occasion presents itself . . . ." 389 U.S. at 362 (Harlan, J., concurring). Justice Harlan further noted that the plain view doctrine is one exception to the Warrant Clause. *Id.* at 361. Since *Katz*, this Court has identified numerous appropriate exceptions to the Warrant Clause, in which searches may be performed without a warrant or probable cause. *See Brigham City, Utah v. Stuart*, 547 U.S. 398, 405-06 (2006) (officers may enter a private home without a warrant or consent under exigent circumstances); *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 604 (1989) (certain toxicological testing without consent constitutes a search that is not subject to the Warrant Clause); *Jacobsen*, 466 U.S. at 125 (certain field testing does not require a

warrant); *Air Pollution Variance Bd. of Colo. v. W. Alfalfa Corp.*, 416 U.S. 861, 864-65 (1974) (some administrative searches are not subject to warrant requirement). Accordingly, this Court honors prior holdings by identifying discrete categories of searches that are not subject to the Warrant Clause. This Court should hold that this sniff of air by a trained narcotics detection dog is not subject to the Warrant Clause.

To determine the application of the Warrant Clause, this Court asks whether a method of search is a reasonable government intrusion upon an individual's privacy interest. *Terry v. Ohio*, 392 U.S. 1, 9 (1968). The *Terry* Court stated that, "there is 'no ready test for determining reasonableness other than by balancing the need to search (or seize) against the invasion which the search (or seizure) entails.'" *Id.* at 21 (quoting *Camara v. Mun. Court*, 387 U.S. 523, 534-35, 536-37 (1967)). In *Terry*, a police officer stopped three individuals whom he suspected of preparing to rob a bank; the officer seized and searched each suspect without obtaining a warrant or possessing probable cause. *Id.* at 7. This Court held that the searches and seizures were constitutional despite the lack of probable cause because the officer had reasonable suspicion that the suspects were contemplating violating the law and that they possessed weapons. *Id.* at 28.

This Court continues to apply the balancing test articulated in *Terry*. *See Delaware v. Prouse*, 440 U.S. 648, 654 (1979); *Texas v. Brown*, 462 U.S. 730, 739 (1983); *Place*, 462 U.S. at 703. In *Place*, this court affirmed the state of the law as a "balance [between] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." 462 U.S. at 703. The *Place* Court confirmed that "effective crime prevention and detection" are legitimate governmental interests that may justify a search or seizure with less than probable cause. *Id.* at 704.

Contrary to Respondent's belief, effective crime prevention and detection are adequate governmental interests to authorize a dog sniff that minimally intrudes on a privacy interest. Officer safety is not the only government interest that authorizes a minimal intrusion on a privacy interest. The Court stated that "[r]espondent suggests that absent some special law enforcement interest such as officer safety, a generalized interest in law enforcement cannot justify an intrusion on an individual's Fourth Amendment interests in the absence of probable cause. Our prior cases, however, do not support this proposition." *Place*, 462 U.S. at 703-04.

In addition, the *Place* Court emphasized careful analysis of the context of a search or seizure, in light of reasonable suspicion of a crime, to determine whether a detention and investigation violates the Fourth Amendment. *Id.* at 705-07. Specifically, the *Place* Court was "asked to apply the principles of *Terry v. Ohio*, [], to permit such seizures on the basis of reasonable, articulable suspicion, premised on objective facts, that the [item to be searched] contain[ed] contraband or evidence of a crime." *Id.* at 702 (internal citation omitted). The Court concluded that it was appropriate to extend the *Terry* analysis, in which an officer stopped and frisked three suspects, to a different fact pattern in which a dog sniffed luggage at an airport. *Id.*

This Court should apply the same *Terry* analysis to the facts in this case to determine whether the actions of Detectives Pedraja and Bartelt, as well as Franky, required a warrant. Detectives Pedraja and Bartelt were acting pursuant to the government's strong interest in law enforcement and crime prevention, just like the officers in *Terry* and *Place*. *See Place*, 462 U.S. at 704. Any perceived lack of officer safety concerns is not conclusive, given the context and method of search used in this case. *See id.* The dog sniff and attempted knock and talk performed by Detectives Pedraja and Bartelt with Franky were minimally invasive. Here, the minimal intrusion upon Respondent's privacy interest, when weighed against the government's

strong interest in law enforcement and crime prevention is determinative: law enforcement officials should not be required to obtain a warrant or to possess probable cause before allowing a dog to sniff air. Instead, the appropriate standard is reasonable suspicion.

1. The reasonable suspicion standard is appropriate because the government's crime prevention interests outweigh the minimal invasion upon Respondent's privacy interest.

Reasonable suspicion is the hallmark of constitutional searches upon less than probable cause. *See Terry*, 392 U.S. at 30; *see also United States v. Cortez*, 449 U.S. 411, 417 (1981). In *Cortez*, the Supreme Court articulated the reasonable suspicion concept used in the *Terry* decision: "the essence of all that has been written is that the totality of the circumstances—the whole picture—must be taken into account." 449 U.S. at 417. Courts verify the existence of reasonable suspicion prior to a search by analyzing "objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers." *Id.* at 418. This Court acknowledged that "a trained officer draws inferences and makes deductions—inferences and deductions that might well elude an untrained person." *Id.* In *Cortez*, the Court concluded that the totality of the circumstances "must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." *Id.*

Here, because the government interest in law enforcement and crime prevention outweighs the minimal intrusion created by Franky's sniff of air, this Court should limit the use of dog sniff searches by applying the reasonable suspicion standard. The totality of the circumstances test identified in *Cortez* appropriately guides this Court's analysis of Detective Pedraja's decision to allow Franky to sniff air outside Respondent's house. *See id.* at 417. This Court should identify Detective Pedraja's inferences and deductions based on observable facts as

interpreted by law enforcement officers to determine whether Detective Pedraja possessed reasonable suspicion of criminal activity at Respondent's house. *See Cortez*, 449 U.S. at 418.

2. The record confirms that Detective Pedraja possessed reasonable suspicion to initiate the dog sniff.

Detective Pedraja had reasonable suspicion to permit a trained narcotics dog to sniff the air outside Respondent's house based upon the totality of the circumstances. Detective Pedraja's investigation of the anonymous tip provided the reasonable suspicion necessary to use a dog sniff based on his training and experience.

Detective Pedraja is trained and experienced in identifying illegal drugs generally, and has specifically investigated hydroponic marijuana cultivation operations. (J.A. 5, 37.) Detective Pedraja observed the absence of vehicles in the driveway and noted the window blinds were closed. (J.A. 9.) Furthermore, Detective Pedraja observed that an air-conditioner was running prior to Franky's sniff, and concluded that the unit ran continuously, without recycling, for at least 15 minutes. (J.A. 37.) Because it was approximately 66 degrees Fahrenheit that morning,[4] and in light of the common use of air-conditioners to regulate the heat created by lamps used in hydroponic marijuana cultivation, Detective Pedraja possessed reasonable suspicion necessary to allow a drug detection dog to alert to the presence of contraband while outside Respondent's house.

Here, the form of the search is crucial; Detective Pedraja possessed the reasonable suspicion necessary to perform a minimally invasive search. An anonymous tip, lack of vehicle in a driveway, drawn blinds, and a constantly-running air-conditioning unit may not give rise to probable cause to enter a home. However, these observations in conjunction with the inferences

[4] *Quality Controlled Local Climatological Data: Hourly Observations Table Opa Locka Airport Miami, FL for Dec. 2006*, NOAA, http://cdo.ncdc.noaa.gov/qclcd/QCLCD (last visited Oct. 2, 2012).

and deductions of a trained narcotics detective provide reasonable suspicion to allow a narcotics detection dog to approach, sit down at, and then depart from Respondent's front door.

The presence of the dog was not invasive. Franky did not, and could not, breach the closed and unanswered door. Nor could the dog identify or communicate any private activity occurring inside Respondent's house because the cloud of narcotic odor existed outside the house. Rather, Franky could only alert to the presence of narcotic odor outside the house. Additionally, Franky is trained to alert to contraband by sitting, as opposed to barking or some other form of attention-grabbing activity. Accordingly, because the search performed by Franky outside of Respondent's house was minimally intrusive, it could be performed upon the detective's finding of a reasonable, articulable suspicion that Respondent's house contained a hydroponic marijuana cultivation operation.

3. If this Court holds the record inadequate to conclude that reasonable suspicion existed to allow the dog sniff, this Court should remand the case to a trial court for additional findings of fact.

If this Court is unable to conclude whether Detective Pedraja had reasonable suspicion, the Court should reverse the decision of the Florida Supreme Court and remand this case to determine the existence of reasonable suspicion prior to the use of a dog sniff. In doing so, this Court should clarify that the investigating officer must possess reasonable suspicion prior to the use of a narcotics detection dog and not prior to a request. As identified in *Terry* and *Place*, the Fourth Amendment protects against unreasonable government intrusions. *See* 392 U.S. at 9; 462 U.S. at 703. A request that a dog be brought to a location is not an intrusion. Furthermore, narcotics detection dogs and dog handlers are limited resources due to the extensive training they require, and so they must be carefully managed by law enforcement agencies. Accordingly, prudent scheduling of narcotics detection dogs and handlers should not be impeded by requiring

an investigating officer to possess reasonable suspicion before requesting the services of a dog. This Court should establish an appropriate restriction on the use of narcotics detection dogs by requiring that investigating officers possess reasonable suspicion before going ahead with a dog sniff, rather than imposing the requirement before requesting the dog sniff.

B. A Sniff of Air by a Trained Narcotics Detection Dog Is Reasonable *Per Se.*

Rather than question whether a dog sniff is constitutional, this Court has determined the legality of the overarching police activity within which a dog sniff is performed. This Court has held that when the police activity is constitutional, the dog sniff is also constitutional. *See Caballes*, 543 U.S. at 408. Similarly, this Court has indicated that a dog sniff may be constitutional, even when holding that the broad police activity violated the Fourth Amendment. *See City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000). This Court should affirm its conclusion that a dog sniff is *sui generis* and hold that Franky's presence did not redefine the legality of the investigation of Detectives Pedraja and Bartelt, because a dog sniff is a *per se* reasonable component of police activity.

In the context of the Fourth Amendment, this Court has characterized a sniff of air by a trained narcotics detection dog as *sui generis* – a category of search unto itself. *See Place*, 462 U.S. at 707; *Caballes*, 543 U.S. at 408. In so identifying the dog sniff, this Court has repeatedly concluded that a sniff of air by a trained narcotics detection dog does not change the character or otherwise "transform [police activity] into a search [subject to the Warrant Clause of the Fourth Amendment]." *Edmond*, 531 U.S. at 40; *see also Caballes*, 543 U.S. at 408; *Place*, 462 U.S. at 707.

In *Edmond*, *Caballes*, and *Place*, this Court relied on factors other than the dog sniff to determine whether the questioned police conduct was constitutional. First, in *Place*, the Court

ultimately suppressed evidence of drugs, despite a lawful dog sniff, because the luggage in which drugs were discovered was detained by authorities for an unreasonable amount of time. *Place*, 462 U.S. at 709-10.

Likewise in *Caballes*, this Court concluded that a dog sniff during a lawful traffic stop did not alter the legality of the stop. 543 U.S. at 409. The *Caballes* Court emphasized that the traffic stop was constitutional based on its minimal duration, and that the addition of a trained narcotics detection dog outside the vehicle during the stop "does not violate the Fourth Amendment." *Id.*

Furthermore, in *Edmond*, this Court distinguished the dog sniff from unconstitutional police activity. 531 U.S. at 40. There, Indianapolis instituted vehicle checkpoints at which drivers were stopped, a narcotics detection dog walked around the vehicle, and a police officer visually scanned the vehicle and requested a driver license and registration. *Id.* at 35. The Court affirmed that the dog sniff was not suspect, but held that "the checkpoints violate the Fourth Amendment[]" because they constituted indiscriminate seizures in the general interest of crime control. *Id.* at 48.

This Court should follow the reasoning in *Place*, *Caballes*, and *Edmond* by questioning whether the attempted knock and talk was legal and acknowledging that the nature of Detective Pedraja's conduct was not altered by the dog sniff. Detectives Pedraja and Bartelt were legally present at Respondent's front door. *See Oliver,* 466 U.S. at 179-80; *Morsman,* 394 So.2d at 409. Accordingly, this Court should not redefine the legality of the detectives' presence based merely on the addition of a police dog. Notably, the record provides no indication that Respondent was aware of, or embarrassed by, the presence of the police dog until after he was detained for operating a hydroponic marijuana grow operation.

Finally, this Court may rely on the reasoning in *Edmond* to establish reasonable limits to the use of police dogs based on the Fourth Amendment. The *Edmond* opinion properly identifies a dog sniff as a component of police activity and focuses scrutiny on the overarching police activity. *See* 531 U.S. at 40. In doing so, the *Edmond* Court verified that a dog sniff is *sui generis*, providing a meaningful balance between the legitimate interest in fighting narcotics production and trafficking and individual protections against unreasonable searches. Accordingly, a general search from house to house would still violate the Fourth Amendment, regardless of the presence of a police dog. This Court should affirm the *Edmond* opinion that indiscriminate searches are unconstitutional, which establishes a constitutional limit on the use of a narcotics detection dog. However, where a police officer is legally present at an individual's front door, the constitutionally appropriate conduct of that officer should not be transformed by the mere presence of a police dog.

This Court should hold that a sniff of air by a trained narcotics detection dog is *sui generis*, and thereby conclude that Franky's sniff was reasonable *per se*. This Court should analyze the police investigation, within which Franky sniffed air outside Respondent's house, to determine whether that overarching activity was constitutional. A review of Detective Pedraja's investigation of an anonymous tip, wherein he observed facts and made inferences based on his law enforcement experience, and so attempted a knock and talk, reveals that the overarching police activity was constitutional. Because Franky's sniff of air outside Respondent's house could not transform Detective Pedraja's conduct into a constitutional violation, evidence of Respondent's hydroponic marijuana grow operation should be admissible.

CONCLUSION

This Court should overturn the Florida Supreme Court's suppression of narcotics evidence against Respondent. While both the United States and Florida Constitutions protect people against unreasonable searches, the use of a drug sniffing dog was reasonable.

This is because Respondent did not have a privacy interest in his front porch. He had not manifested a privacy interest in that area, showing he did not have a subjective privacy expectation. Further, society is not prepared to consider a privacy interest in an exposed front porch reasonable because that area is not within the curtilage of Respondent's home. Florida law states that residents of homes have no privacy interest in their front porches.

A dog sniff is also a permissible use of technology because it is non-invasive and discriminate. The practice of dog sniffs is analogous to the use of airplanes by police officers, which this Court has validated as reasonable under the Fourth Amendment. Finally, this Court's jurisprudence holds that dog sniffs are minimally invasive and detect only contraband, and that a person does not carry a privacy interest in such items. These holdings have been followed in lower courts to validate dog sniffs.

Alternatively, Franky's sniff outside Respondent's door was constitutional because it was predicated upon Detective Pedraja's reasonable suspicion of criminal activity at Respondent's house. First, the government's interest in crime prevention and law enforcement outweigh the minimal intrusion of Respondent's privacy interest caused by Franky's sniff of air, so the Court should apply a reasonable suspicion standard to the dog sniff. Second, the totality of the circumstances test confirms that Detective Pedraja had reasonable suspicion based on his experience investigating hydroponic marijuana grow operations, as well as his factual observations that confirmed the anonymous tip about marijuana production.

Finally, Franky's sniff outside Respondent's door is constitutional because it is reasonable *per se* as one component of Detective Pedraja's investigation of an anonymous tip. This Court's jurisprudence holds that a dog sniff is reasonable when performed in the context of a constitutional police activity. Franky's sniff was constitutional because it was performed where and when Detective Pedraja was legally present outside Respondent's house. Therefore, this Court should reverse the Florida Supreme Court's decision to suppress evidence of Respondent's hydroponic marijuana cultivation operation and hold that evidence admissible.

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